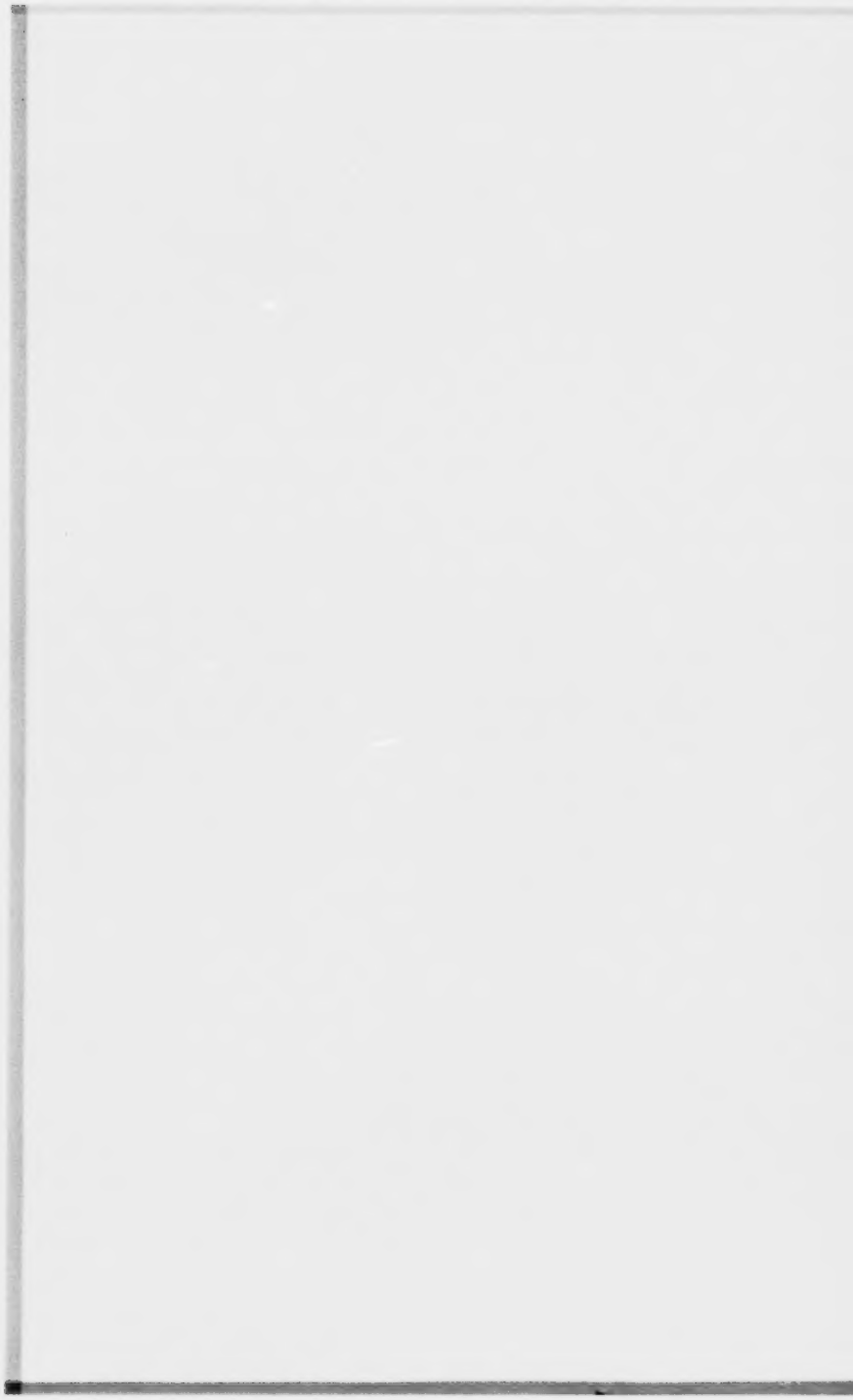

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

ALGOMA NET COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 124 F. (2d) 730, and is appended hereto as Exhibit (A), and likewise set forth in full at pp. 450-456, inclusive, in the Transcript of Record.

Jurisdiction.

The Supreme Court of the United States has jurisdiction to review the Decision and Decree of the United States Circuit Court of Appeals for the Seventh Circuit under the provisions of the Act of Congress of June 25, 1936, Chapter 804, 49 Stat. 1921, U. S. C., Title 29, Section 160(e), being that provisions of the National Labor

Relations Act specifically providing for review of the Decree of the Circuit Court of Appeals upon Writ of Certiorari as provided in Section 347 of Title 28, and, hence, under the provisions of Section 240 of the Judicial Code, as amended by the Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 938, U. S. C. Title 28, Section 347(a), conferring jurisdiction upon the Supreme Court of the United States to require by certiorari that the Decree of the Circuit Court of Appeals be brought up.

The date of the Decision, Orders Staying Execution and extending time for filing this petition, and some of the cases which petitioner believes substantiate the jurisdiction of this Court are found in the jurisdictional statement in the foregoing petition, and, for the sake of brevity, that jurisdictional statement is referred to and incorporated herein as though made a part of this brief.

Statement of the Case.

A summary statement of the case appears in the foregoing Petition for Writ of Certiorari, which, in the interest of brevity, is incorporated herein by reference.

Specification of Errors.

The United States Circuit Court of Appeals for the Seventh Circuit erred in the following respects:

1. In holding that the National Labor Relations Board possessed jurisdiction to hear this case and issue an Order therein, where the Wisconsin Labor Relations Board first assumed jurisdiction and dismissed the case before the National Labor Relations Board took cognizance of or attempted to assume jurisdiction.
2. In holding that the Findings of Fact, Conclusions of Law, and Order of the National Labor Relations Board were supported by substantial evidence.
3. In holding that an employer's public expression of his views on labor relations in general condemna-

tion of union racketeering and interference without specific reference to any one union or racketeer, constituted an unfair labor practice within Section 8(1) of the National Labor Relations Act.

4. In holding that this petitioner was responsible for the expressions of opinion on labor relations of a minor supervisory employee, with power only to recommend hiring and firing, and with no authority from the employer or knowledge by the employer in regard to the making of such statement.

5. In holding that, although the employer demonstrated legitimate reasons and motives for the acts complained of in this matter, the Board segregated a co-extensive illegitimate motive and concluded thereon, by conjecture, that the illegitimate motive was the sole motive, and that, hence, an unfair labor practice had been committed.

6. In sustaining those portions of the Board's order requiring the employer to cease and desist from violations of any and all provisions and sections of the Act, even though the Board limited its Findings to violations of Sections 8(1) and (3) of the Act.

7. In sustaining that portion of the Board's Order requiring the reinstatement with back wages of employees guilty of violation of important rules of the company, and of the criminal statutes of the State of Wisconsin.

8. In sustaining that portion of the Board's Order requiring the payment of back wages to the employees affected, after the Board had unreasonably permitted such contingent liability to accumulate over an undue length of time before rendering its Order or seeking enforcement of its provisions.

9. In sustaining that portion of the Board's order requiring the employer to post notices stating that the employer will not engage in the unfair practices from which it is ordered to cease and desist, thereby admitting liability and guilt.

ARGUMENT.

Preliminary Statement.

Although petitioner submits that this case presents many cogent reasons for the granting of the Writ, none seem as patent or urgent to petitioner as the necessity of resolving the conflict or jurisdiction between the National and the Wisconsin Labor Relations Boards, as presented here, and of revising this decision so as to bring the formal requirement of the Board's Order into harmony with the current state of the law.

In the interest of brevity, cases cited in that section of the petition entitled "Reasons Relied on for the Allowance of the Writ" are not repeated here in the brief unless made the subject of special comment.

I. The Writ Should Be Allowed Because the Decision of the Circuit Court of Appeals, Holding That the National Labor Relations Board Had Jurisdiction to Reopen the Case After the Wisconsin Labor Relations Board Concluded Its Administration and Disposed Thereof, Involved an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Existing precedents in the field of a conflict in the jurisdiction of the National and Wisconsin Labor Relations Boards carries up to but not into the precise question presented by this case.

The Wisconsin Board and the National Board have concurrent jurisdiction over interstate commerce labor disputes in Wisconsin. The legislative acts from which these Boards derive their authority are almost identical in terms and policy; no conflict exists material to this case. The

alleged unfair labor practice complained of here under Section 8(1) and 8(3) of the National Act are condemned in identical language in Sections 111.08(1) and (3) of the Wisconsin Statutes for 1937, applicable at the time of the occurrences complained of. (See Appendix (E) of this Brief.) The policy and other provisions of the Wisconsin Act and of Chapter 111 of the Wisconsin Statutes for 1937 are almost identical. The only possible conflict here between Governments is a conflict between administrative agencies, not between statutes, which, if the latter were the case, might oust the state jurisdiction.

The jurisdiction of these two Boards is concurrent here because Congress intended that it be so. *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Company,* 228 Wis. 473 (1938); *Senn* v. *Tile Layers' Protective Union Local No. 5,* 301 U. S. 468 (1937). The National Labor Relations Act does not *ipso facto* preclude application of the state law as to the same situations. For Congress to curtail the state police power and exclude the jurisdiction of the state, the congressional intent must be clear and will not be lightly inferred; since the acts are consistent, that of Congress does not supersede or exclude that of the state legislature. *Mintz* v. *Baldwin,* 289 U. S. 346 (1933). Section 10(a) of the National Labor Relations Act establishes the exclusive character of the National Board's administrative power only as applied to other administrative agencies, and does not apply to a state law passed subsequent to the enactment of the National Act. *Devega City Radio, Inc.* v. *State Labor Relations Board,* 281 N. Y. 13 (1939); *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Company,* 228 Wis. 473 (1938). Upon these considerations it has been held that the National Labor Relations Act does not so clearly manifest an intention to exclude state regulations as to supersede, in so far as labor practices affecting interstate commerce are concerned, state legislation covering the same ground, and particu-

larly has not superseded the Wisconsin Labor Relations Act of 1937. *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Company,* 228 Wis. 473 (1938). Nor has it superseded the present Wisconsin Employment Peace Act. *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board,* 62 S. Ct. 820 (1942). Nor has it superseded the New York Labor Relations Act, similar to the National Act and the first Wisconsin Act. *Dagega City Radio, Inc.* v. *State Labor Relations Board,* 281 N. Y. 13 (1939).

Where concurrent jurisdiction exists, as here, the Wisconsin Board may act until the National Board assumes jurisdiction. 2 *Labor Disputes and Collective Bargaining,* Teller (1940) Section 270. Casting a doubt as to whether the State law might not continue in operation, even after the National Act becomes operative, it has been held that the New York State Board may enforce the State Act "at least" until such time as the National Labor Relations Board *assumes* jurisdiction. *Davega City Radio, Inc.* v. *State Labor Relations Board,* 281 N. Y. 13 (1939). Whenever the National Labor Relations Act operates in a field occupied by the Wisconsin Labor Act, state power is merely suspended, at most, but lives on. *Allen Bradley Local No. 1111* v. *Wisconsin Employment Relations Board,* 62 S. Ct. 820 (1942). It has been so held in the field of telephone rate regulations. *Northwestern Bell Telephone Company* v. *Nebraska State Ry. Comm.,* 297 U. S. 471 (1936).

Hence, under the authority of these precedents, the Wisconsin Labor Relations Board had jurisdiction to act and conclude the matters in this case prior to the entry of the National Labor Relations Board. Contrary to the assumption of the Circuit Court of Appeals in its decision in this case, petitioner cited the authority of *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Company,* 228 Wis. 473 (1938), only for this proposition.

The question which has not yet been determined definitely in the field of labor disputes is that which petitioner contends for here, namely, that the power of the National Board to assume jurisdiction in this field is terminated by the conclusion and dismissal of the issues by the Wisconsin Board prior to the time that the National Board first sought to interpose.

Admittedly, as pointed out in the "Summary" in the foregoing petition, the National Board failed to enter this case until after the State Board took its concluding steps and dismissed the case. For the National Board to assume jurisdiction, it is not sufficient alone that the National Labor Relations Act exist, but the Board itself must act in relation to the facts of the particular instance.

> "* * * It is the exercise of Federal jurisdiction under an actual law, and not the passage of the law, which ousts state courts or agencies from jurisdiction to act."
>
> 2 *Labor Disputes and Collective Bargaining*, Teller (1940) Section 270.

To exercise jurisdiction means to take control of the controversy. *Davega City Radio, Inc.* v. *State Labor Relations Board*, 281 N. Y. 13 (1939). Analogously, state utility rates can be supplanted only by an actual rate "administratively determined by the Interstate Commerce Commission itself." *Northwestern Bell Telephone Company* v. *Nebraska State Ry. Comm.*, 297 U. S. 471, 480 (1936). As previously stated, it is the practice of both the Wisconsin and the National Boards to dismiss charges filed with them, where no complaint has issued, by informal communication of such dismissal to the potential respondent, if any communication is given at all, and by no further evidence of dismissal than is presented in the facts before us. That practice of the National Board has been applied and upheld in such a way, in a reverse situation, as to substantiate respondent's contention here. *John A. Fedor*,

Tepco Employees' Union v. *The Enamel Products Company*, (Court of Common Pleas, Cuyahoga County, Ohio, 1940) 2 C. C. H. Labor Cases, Section 18,749.

The principle of the foreclosure of jurisdiction of the National Board upon the conclusion and dismissal of the issues by the Wisconsin Board, prior to the time when the National Board first seeks to interpose, has been applied in analogous circumstances. So in regard to identical Federal and State laws regarding closed seasons so game birds. *Carey* v. *South Dakota*, 250 U. S. 118 (1918). So in the matter of Federal and Ohio legislation prohibiting the sale of prison-made goods. *Whitfield* v. *Ohio*, 297 U. S. 431 (1936). So in the matter of State and Federal utility rates. *Northwestern Bell Telephone Company* v. *Nebraska State Ry. Comm.*, 297 U. S. 471 (1936). In the latter case, in emphasizing the policy involved, the court said, p. 478:

> "It cannot be supposed that Congress intended * * * to preclude all regulations, State and National, * * * for an indefinite time, until the I. C. C. could act administratively to prescribe rates."

See 11 *Am. Jur., Commerce*, Section 26. Respondent submits that an important principle is involved, to-wit, the power to act implies the power to conclude. Existing precedents, without interruption, as reviewed here, have conceded the power of the Wisconsin Board to act in this case prior to the entry of the National Board. Such power to act would be meaningless if it did not carry with it the power to finally determine the issues in a binding manner upon the parties involved. Otherwise, the law would hold no certainty, and the principles of concurrent jurisdiction and the right of the state to act at all would be a farce. If the State can compel parties to recognize its jurisdiction, as here, those parties must be permitted to rely upon the determination reached by the state. As previously indicated, it is not necessary

to extend this principle to a situation not involved here where the State may not have concluded its assumption of jurisdiction.

The question is one of gravest importance and novelty, both to the Government and to the public. The growing number of state labor laws increase the potentiality of conflicting jurisdictions between State and National Labor Relations Boards. The predicament of the employer in the present case illustrates the future of employers throughout the forty-eight states unless an early and immediate determination of the problem is handed down by this Court.

II. The Writ Should Be Allowed Because of the Serious Conflict in Decisions, Not Only With the Decisions of This Court, But Also With Those of the Various Circuit Courts of Appeals, in the Holding of the Circuit Court of Appeals for the Seventh Circuit That This Employer's Public Expression of His Views on Labor Relations in General Condemnation of Union Racketeering and Interference, Without Specific Reference to Any One Union or Racketeer, Is an Unfair Labor Practice Under Section 8(1) of the National Labor Relations Act, and Constitutes Substantial Evidence to Support a Finding of an Unfair Labor Practice Under Section 8(3) of the Act.

Petitioner submits that the present case, by virtue of the holding of the Board and the Circuit Court of Appeals to the effect that such employer's expressions alone constituted unfair labor practices (R. 97), falls within the condemnation of this Court's decision in *National Labor Relations Board* v. *Virginia Electric Light & Power Company*, 86 L. Ed. (Adv. Op.) 306 (1941), in which the Court said:

> "It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the

> stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone."

Likewise, and in particular, where the employer emphasizes his true position to the employees through posted notices, as in the instant case, *National Labor Relations Board* v. *Sands Manufacturing Company*, 306 U. S. 332 (1939).

Under like circumstances, the various Circuit Courts of Appeals have gone no further than to grant that such expressions constitute no more than a violation of Section 8(1) of the Act, but certainly not of Section 8(3) of the Act. *Foote Bros. Gear & Machine Corp.* v. *National Labor Relations Board*, 114 F. (2d) 611 (C. C. A. 7th, 1941); *National Labor Relations Board* v. *Walter Stover*, 114 F. (2d) 513 (C. C. A. 10th, 1940).

Without further discussion here, the Court is respectfully referred to further cases cited in the second paragraph of that section of the petition entitled "Reasons Relied on for the Allowance of the Writ."

III. The Writ Should Be Allowed Because of the Conflict in Decision Arising Through the Holding of the Circuit Court of Appeals Here That This Employer Is Charged With the Expressions of Opinion on Labor Relations Made by a Minor Supervisory Employee, With Power Only to Recommend Hiring and Firing, and With No Authority From the Employer or Knowledge by the Employer in Regard to the Making of Such Statements.

It would seem that the vastly confused field of decisions in regard to the employer responsibility for expressions and actions of minor supervisory officials, with as little authority and with as little weight with employees as is exemplified by the case at bar, has not yet been resolved by the decisions of this Court. Precedents cited in para-

graph 3 of that section of the foregoing petition entitled "Reasons Relied on for the Allowance of the Writ" demonstrate but a portion of this confusion. Further clarification would seem necessary at this time.

IV. The Writ Should Be Allowed Because of Conflict in Decisions Created Through the Holding of the Circuit Court of Appeals Here That, Where the Board Finds Both a Legitimate and Illegitimate Motivation for the Acts Complained of, It May Guess That the Illegitimate Motive Was the Operative Cause and Conclude Thereon That an Unfair Labor Practice Had Been Committed.

Contrary precedents set forth in paragraph 4 of that section of the foregoing petition entitled "Reasons Relied on for the Allowance of the Writ" are characterized by the position of the Wisconsin Supreme Court in *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Company*, 228 Wis. 473 (1938), under sections of the Wisconsin Labor Act identical to the National Labor Relations Act, that a Labor Board Order of Reinstatement cannot be sustained where the findings do not clearly determine the absence of a valid cause for the discharge.

V. The Writ Should Be Granted Because of the Conflict in Decisions Created by the Holding of the Circuit Court of Appeals Here That the Board May Validly Order the Employer to Cease and Desist From Violations of All of the Provisions of the National Labor Relations Act, Upon a Proper Showing of Violation of Sections 8(1) and 8(3) of That Act.

Paragraph 1(b) of the Board's Order (R. 99), repeated by the Court in its Decree (R. 462), requires petitioner to cease and desist from in any manner violating any provisions of Section 7 of the Act. As such it is too broad and should be stricken from the order, as being in conflict with the rules of this Court in the case of *National Labor Rela-*

tions Board v. *Express Publishing Company*, 312 U. S. 427 (1941). An appropriate order would go no further than to restrain petitioner from the commission of the specific unfair labor practices found to have been indulged in. There are no circumstances in this case warranting a broader order, there being no threat of continuing or varying efforts to attain the same end in the future, assuming that the Board has proved past unfair labor practices. The testimony indicates no act in relation to employees which cannot be remedied by the paragraphs of the Order specifically referring to the employees allegedly discriminated against.

The principle and the rule has been applied similarly in cases cited by other Circuit Courts of Appeals, as set forth in paragraph 5 of that section of the foregoing petition referred to as "Reasons Relied on for Allowance of the Writ."

This Court has itself applied similar principles in analagous situations. *Swift & Company* v. *United States*, 196 U. S. 375 (1905) (Sherman Anti-Trust Act involved); *New York, N. H. & H. R. R. Company* v. *I. C. C.*, 200 U. S. 361 (1906) (Interstate Commerce Act involved); *Federal Trade Commission* v. *Gratz*, 253 U. S. 421 (1920) (Federal Trade).

VI. The Writ Should Be Granted Because of Conflict in Decisions Created by the Holding of the Circuit Court of Appeals Here That Board May Validly Order the Reinstatement, With Back Wages, of Employees Guilty of Violations of the Important Rules of the Company and the Criminal Statutes of the State of Wisconsin.

Petitioner respectfully suggests that the criminal acts committed in the instant case fall within the restraints imposed by this Court in the cases of *National Labor Relations Board* v. *Fansteel Metalurgical Co.*, 306 U. S. 240 (1939), and *Southern Steamship Company* v. *National*

Labor Relations Board, 62 S. Ct. 886, 1942, even though it be assumed that unfair labor practices had been committed.

Reinstatement with back wage orders have been held invalid under facts nearly identical with those presented in the case at bar. *Martel Mills Corp.* v. *National Labor Relations Board,* 114 F. (2d) 624, C. C. A. 4th (1940) (See cases cited in paragraph 6 of that section of the foregoing petition entitled "Reasons Relied on for the Allowance of the Writ"). A similar result has been reached for violation of important rules of a company. *National Labor Relations Board* v. *Empire Furniture Corporation,* 107 F. (2d) 92 (C. C. A. 6th, 1939). (See further cases at paragraph 6 of the section of the foregoing petition referred to as "Reasons Relied on For the Allowance of the Writ.") And even though no conviction were sought in the case at bar, the criminal acts fall within the crimes barring reinstatement orders set forth in *Republic Steel Corporation* v. *National Labor Relations Board,* 107 F. (2d) 472 (C. C. A. 3d, 1939).

VII. The Writ Should Be Allowed Because of the Conflict of Decisions Created by the Holding of the Circuit Court of Appeals Here That the Board May Validly Order Payment of Back Wages Even Though Guilty of Laches in Bringing the Case to the Point of Enforcement.

A modification of the Order would seem to be necessary in conformity with the decisions of the various Circuit Courts of Appeals, as set forth in paragraph 7 of that section of the preceding petition entitled "Reasons Relied on for Allowance of the Writ," in view of the fact that, without explanation, the Board did not issue the intermediate report until seven months after the close of the hearing, on June 9, 1939, such report having been dated February 8, 1940; that the Order of the Board was not issued until November 23, 1940; that the petition for enforcement is dated May 29, 1941; and that during this entire period,

the Board permitted this petitioner's contingent liability to accumulate unreasonably and inequitably.

VIII. The Writ Should Issue Because of Conflict in Decisions Created by the Holding of This Circuit Court That the Board May Validly Order the Employer to Post Notices, Stating That the Employer Will Not Engage in the Unfair Labor Practices From Which It Is Ordered to Cease and Desist.

Paragraph 2(c) of the Board's Order (R. 100), as decreed and enforced by the Circuit Court of Appeals (R. 463), requires petitioner to post notices stating that petitioner will not engage in conduct from which it is ordered to cease and desist; that order is in direct conflict with the holding of the Circuit Courts of Appeals for the Fourth Circuit and for the Sixth Circuit, as found in the decisions set forth in paragraph 8 of that section of the foregoing petition entitled "Reasons Relied on For the Allowance of the Writ." A situation exists where the Seventh Circuit here permits such an Order, thus requiring the employer to admit guilt and liability by the notice, while two other circuits go no further than to permit the Board to require that a notice be posted, setting forth the Order of the Board, and that the Court approves of such Order. It would seem that the reasoning of the Fourth and Sixth Circuits far transcends that of the Seventh Circuit. Regardless, the conflict is firm.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari, and thereafter reviewing and reversing said decision.

Respectfully submitted,

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